No. 10-786

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In the
Supreme Court of the United States

KINGDOM OF SPAIN and
THYSSEN-BORNEMISZA COLLECTION FOUNDATION,
Petitioners,

v.

ESTATE OF CLAUDE CASSIRER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONER

This case provides a suitable vehicle for resolution by this Court of two important questions of international significance and recurring practical importance regarding the Foreign Sovereign Immunities Act's ("FSIA"), 28 U.S.C. 1602 *et seq.* expropriation exception: (1) whether the FSIA's "expropriation exception" permits a United States court to strip a foreign sovereign of its presumptive sovereign immunity simply because it owns property allegedly taken in violation of international law by a different sovereign, and (2) whether a plaintiff relying on the FSIA's expropriation exception must exhaust available remedies in the relevant country before invoking a United States court's jurisdiction. Pet. i.

As respondent itself does not – indeed, cannot – dispute:

- There are few questions as important as whether an action implicates or interferes with foreign relations;

- The *en banc* Ninth Circuit's resolution of the questions presented directly conflicts with the publicly stated policy of the State Department – the drafter of the FSIA – regarding expropriation claims;

- The *en banc* Ninth Circuit's interpretation is directly at odds with the stated positions of at least two other courts of appeals and two district courts;

- The petition's interlocutory nature is no barrier to this Court's review – particularly, in light of the weighty concerns implicated by stripping a foreign sovereign of its immunity – as evidenced by this Court's repeated willingness to grant review of interlocutory FSIA petitions; and

- In FSIA cases where this Court declines to grant review outright, it regularly solicits the views of the Solicitor General and State Department.

Nonetheless, respondent advances five unpersuasive reasons why this Court should deny review and does not so much as address whether this case is an appropriate candidate for solicitation of the federal government's views. First, respondent claims that the *en banc* Ninth Circuit's decision does not "conflict" with the decision of any other court. But as explained in the petition, the Ninth Circuit's decision is at least in significant tension with the decisions of other courts, which have stated that Section 1605(a)(3) was intended to apply to the foreign sovereign who *itself* took property in violation of the laws of nations and that such a taking has not occurred unless and until the claimant has exhausted appropriate local remedies.

Second, respondent at least superficially asserts that the Ninth Circuit's holding does not conflict with any stated policy of the State Department. Respondent acknowledges, however, that the Ninth Circuit's interpretation directly contravenes the State Department's espousal policy, which, while arising in a slightly different context, does embody the State Department's policy for expropriation claims and, by

all appropriate measures, also embodies its reading of the expropriation exception that it drafted.

Respondent next contends that the questions presented are of limited significance. Putting aside the extraordinary significance of any case in which a United States court strips a foreign sovereign of its immunity, as explained *infra*, Section 1605(a)(3) has been invoked in dozens of cases, and that number is likely to increase as state legislatures continue to enact legislation designed to resuscitate otherwise stale international property claims like respondent's.

Respondent asserts that the interlocutory nature of this case counsels in favor of denying review. This Court, however, grants review of interlocutory petitions and does so even more frequently when issues are raised implicating weighty immunity and foreign affairs concerns, like those presented here.

Finally, respondent advances several merits-based arguments as to why the Ninth Circuit's decision is correct.[1] Petitioners disagree with those merits-based

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[1] Respondent does not defend the Ninth Circuit's holding that Section 1605(a)(3) "does not mandate that the plaintiff exhaust local remedies for jurisdiction to lie." Pet App. 5a. Respondent mistakenly asserts that the two judges who dissented from the *en banc* majority's decision "did not disagree with the majority's exhaustion analysis." BIO 9. This is patently incorrect. Judge Gould and Chief Judge Kozinski stated that Section 1605(a)(3) requires an exhaustion of remedies, "as part and parcel of determining whether there had been a taking in violation of international law." Pet. App. 43a.

Judge Gould and Chief Judge Kozinski so stated, of course, because contrary to respondents' mistaken assertion, BIO 25,

arguments for the reasons set forth in the petition and to be developed further if this Court grants review. But for present purposes, the significance of these arguments and their responses is that they underscore the fundamental tension – if not outright disagreement – between the views of the Ninth Circuit on one hand and the views of other courts and the State Department on the other, and suggest at a minimum the need for solicitation of the federal government's views – if not an outright grant of immediate review.

I. The Issues Presented In This Petition Are Of Exceptional Importance

Respondent devotes much of its brief in opposition to the assertion that this case presents a "relatively unusual situation," BIO 10, and that a court's need to interpret Section 1605(a)(3) arises "extremely infrequently," BIO 9. Such a suggestion is wholly misinformed. More than forty cases have addressed the FSIA's expropriation exception.[2] *See* Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. Transnat'l L. & Pol'y 1, 36 (2008) (collecting cases). Moreover, the universe of persons or families who may assert jurisdiction against a foreign sovereign under the FSIA and allege wrongful ownership is significant. In fact, in a brief

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petitioners did properly raise the exhaustion issue below. Both the district court and the Ninth Circuit majority addressed the issue.

[2] In fact, in its brief in opposition, respondent cites three FSIA cases filed within the last ten years that considered many of the very same FSIA challenges at issue in this action. BIO 10-11.

filed in *Von Saher v. Norton Simon Museum of Art at Pasadena* (No. 09-1254), currently before this Court on writ of certiorari, the Commission for Art Recovery notes that the "United States is home to the third-largest Holocaust survivor population in the world," and that, depending on this Court's resolution of the question presented in that case, "thousands of individuals" may be poised to bring claims to recover Nazi-looted artworks. Brief of *Amicus Curiae* Commission for Art Recovery in Support of Petitioner (No. 09-1254), at 8, 9. There can be little doubt that the majority of these claims would be made against foreign sovereigns, and it is very likely that a significant number could be directed at sovereigns and their agencies or instrumentalities who, like petitioners, are not alleged to have committed any violation of international law.

Moreover, this Court has consistently recognized that a case's impact on the United States' foreign relations is of fundamental importance, constituting ground for review.[3] *See, e.g., Christopher v. Harbury*, 536 U.S. 403, 412 (2002) (granting review because of the "importance of th[e] issue to the Government in its conduct of the Nation's foreign affairs"); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002) (recognizing that review was proper where the action "implicate[d] serious issues of foreign relations"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) (granting review when issues "bear importantly on the conduct of the country's foreign relations"); *Kolovrat v. Oregon*,

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[3] The Ninth Circuit recognized the issues in this action to be so important that it decided to rehear the case *sua sponte*.

366 U.S. 187, 191 (1961) (finding review proper where case involved "important rights asserted in reliance upon federal treaty obligations"). Because the resolution of the questions presented will have a direct impact on foreign relations with Spain – and any other foreign sovereign who will be haled into court to respond to a violation of international law committed by a different sovereign – this petition is of sufficient importance to warrant review.

II. The Ninth Circuit's Interpretation Of Section 1605(a)(3) Is Directly At Odds With The State Department's Policy

Respondent asserts that "[t]he State Department – and in particular its Special Envoy for Holocaust Issues – has been aware of this case since its inception . . . ." BIO 12. Respondent's implication is, of course, that the State Department has not intervened in this action because it endorses the *en banc* majority's decision. The State Department's silence, however, cannot be read as tacit approval for the majority's holdings.[4]

In the only forum in which the State Department has stated its views regarding the process and propriety of asserting claims against foreign sovereigns for property restitution, the State Department has spoken clearly that it will not support such claims unless "the acts giving rise to the claim . . . constitute a violation of international law that is

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[4] Both the majority and the dissent below noted that the State Department's views are conspicuously absent from this case. Pet. App. 24a, 46a-47a.

attributable to the foreign government," and "the claimant . . . exhaust[s] local remedies in the relevant country, or demonstrate[s] that doing so would be futile."[5] The State Department's clear message regarding the conditions required for it to press a claim to a foreign sovereign is the only public, affirmative statement that appears to exist regarding the State Department's reading of the FSIA – an Act *drafted* by the State Department.[6] Because the State Department, the entity charged with developing

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[5] This website is available at http://www.state.gov/p/eur/rt/hlcst/c11383.htm.

[6] No one can dispute that the State Department is interested in this case. In early December 2010, WikiLeaks released the text of a July 2, 2008, cable summarizing a meeting between the U.S. Ambassador in Madrid and the Spanish Minister of Culture. *See US embassy cables: US and Spain discuss Nazi stolen art and treasure seeking company Odyssey*, Guardian.co.uk [The Guardian (London)], Dec. 8, 2010, available at: http://www.guardian.co.uk/world/us-embassy-cables-documents/160421. In the cable, the Ambassador offered to support Spain in the "Odyssey matter" (a dispute between Spain and an underwater exploration company regarding the ownership of sunken Spanish treasure) if Spain would provide assistance in the Cassirer action. In the view of the U.S. diplomat, it was "in both governments' interest to avail themselves of whatever margin for maneuver they had, consistent with their legal obligations, to resolve both matters in a way that favored the bilateral relationship." *Id.* The Spanish contingency refused to barter, however, and maintained that the issues were separate. *Id.*

Because the State Department has been aware of this action from its inception and, rather than allow the action to play out in the courts, has pressed Spain to enter into a diplomatic agreement, one could reasonably conclude that the State Department is not willing to adopt the FSIA interpretation advanced by the *en banc* majority.

applicable foreign policies, has recognized that restitution may be sought only against the sovereign that is alleged to have violated international law and that exhaustion is necessary, the courts should defer to its interpretation. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (recognizing that "this Court consistently has deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities").

As noted in the petition, this Court routinely solicits the views of the Solicitor General who, together with the State Department, has filed amicus briefs in connection with a significant number of petitions involving the FSIA. Pet. 8-9, n.2 (listing twelve recent briefs filed by the Solicitor General in actions involving the FSIA).[7] Because the proper and uniform application of the FSIA is of great importance, and because both parties and the Ninth Circuit have questioned the State Department's position, if the Court is unwilling to grant the petition outright, the Court should at a minimum request the views of the Solicitor General.[8]

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[7] Before granting review, this Court sought the views of the Solicitor General in *Von Saher*, mentioned above, a case posing procedural challenges to Holocaust-era claims.

[8] Recognizing the importance and frequency of World War II restitution claims, the State Department created a distinct department, the Office of the Special Envoy for Holocaust Issues, to "develop[] and implement[] U.S. policy with respect to the return of Holocaust-era assets to their rightful owners." Holocaust Issues webpage, U.S. Department of State, at:

III. The Ninth Circuit's Interpretation Of Section 1605(a)(3) Is In Tension With The Interpretation Of Other Circuits

Respondent asserts that the Ninth Circuit's decision does not conflict with decisions from other circuits. BIO 11. It is beyond dispute, however, that the Ninth Circuit's holding is in dramatic tension with two other circuits that have reviewed Section 1605(a)(3) and recognized that this immunity-stripping exception should apply to nations that themselves have taken the property in violation of international law.

Although not squarely presented with the question of whether to strip the sovereignty of a foreign nation where that nation did not commit a violation of international law, the Fifth Circuit, in analyzing the parameters of Section 1605(a)(3) recognized that "the legislative history of the FSIA indicates that Section 1605(a)(3) was intended to subject to United States jurisdiction any foreign agency or instrumentality that has nationalized or expropriated property without compensation, or that is using expropriated property taken by another branch of that state." *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 204 (5th Cir. 1984). Similarly, in *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008), the D.C. Circuit acknowledged that Section

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http://www.state.gov/p/eur/rt/hlcst/. The State Department's expropriation policy, described above, noting the limited situations where the U.S. will espouse a claim to a foreign government, falls under the banner of the Office of the Special Envoy for Holocaust Issues.

1605(a)(3), "effectively require[es] that the plaintiff assert a certain type of claim: that the defendant (or its predecessor) has taken the plaintiff's rights in property (or those of its predecessor in title) in violation of international law." *Id.* at 941. Full-fledged conflict or not, these interpretations are clearly at odds with the Ninth Circuit's holding that a sovereign can be stripped of its presumptive immunity because of the wrongful acts of another, unrelated sovereign.

IV. The Nature Of this Case Warrants Immediate Review

Where, as here, a case involves an issue of great importance, a petition's interlocutory nature is no barrier to this Court's review. *See* Robert L. Stern et al., Supreme Court Practice § 4.18, at 282 (9th ed. 2007) (noting that "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review"); *American Constr. Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893) (recognizing that this Court has not hesitated to review an interlocutory judgment of a court of appeals when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"); *see also, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997).

Respondent's assertion that review is premature might be persuasive in a small-dollar action between two private parties, but those concerns get no traction when the case involves a foreign sovereign. The Kingdom of Spain – a sovereign nation which is a long-time ally of the United States, a NATO member, a

member of the European Union, and the Ninth largest economy in the World, having mutual trade with the United States of more than $18 billion in 2010 – is a petitioner. If the Ninth Circuit's *en banc* decision stands, Spain will be forced to submit to the jurisdiction of the courts of the United States and defend itself against a private property claim, in an action involving an object that has no connection to the United States and where it is beyond dispute that Spain has committed no violation of international law. *See Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) (recognizing that "[a] foreign government should not be put to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity").

Before forcing a sovereign nation to submit to the jurisdiction of U.S. courts, this Court must determine whether such an action is contemplated, permitted, and endorsed by the FSIA.[9] *See Compania Mexicana*

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[9] Issues discussed in this petition also raise important diplomatic and international concerns. Even within the last year, a legal challenge to the FSIA's expropriation exception erupted in the United States, having far-reaching consequences. On June 8, 2008, the U.S. Court of Appeals for the D.C. Circuit held that the FSIA's expropriation exception did not apply to bar the plaintiffs' claims and found that the district court could exercise jurisdiction over the Russian Federation. *See Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 955 (D.C. Cir. 2008). On June 26, 2009, the Russian Federation informed the district court that it "decline[d] to participate further in this litigation" and "believe[d] this Court has no authority to enter Orders with respect to the property owned by the Russian Federation and in its possession, and the Russian Federation will not consider any such Orders to

de Aviacion, S.A. v. United States Dist. Ct., 859 F.2d 1354, 1358 (9th Cir. 1988) (recognizing that the history of the FSIA, "including representations of the State Department," supported a "prompt" determination of sovereign immunity).

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be binding on it." *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 729 F. Supp. 2d 141, 144 (D.D.C. 2010). On July 30, 2010, the district court entered a default judgment against the Russian Federation, ordering it to turn over historical and religious materials long-possessed by Russian archives and libraries. *See id.* at 148. In direct response, State-run Russian museums, including the Hermitage in St. Petersburg and the Pushkin Museum of Fine Arts in Moscow, cancelled long-scheduled loans to American institutions. If the Ninth Circuit's opinion stands unquestioned, Spain and other foreign sovereigns may feel compelled to reconsider and withdraw from their agreements (cultural and otherwise) with the United States.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, certiorari should be granted.

Date: February 22, 2010

Respectfully submitted,

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